Supreme Court, U.S.
FILED
DEC 1 2000
CLERK

(5)

No. 00-191

In the
SUPREME COURT OF THE UNITED STATES

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

COLORADO REPUBLICAN
FEDERAL CAMPAIGN COMMITTEE,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE STATES OF MISSOURI, COLORADO, HAWAII, MONTANA, NEW YORK, OKLAHOMA AND VERMONT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a political party has a First Amendment right to make unlimited campaign expenditures in coordination with the party's congressional candidates, notwithstanding the limits on such coordinated expenditures imposed by the Federal Election Campaign Act of 1971, 2 U.S.C. 431 et seq.

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BRIEF *AMICUS CURIAE* FOR THE STATES OF MISSOURI, COLORADO, HAWAII, MONTANA, NEW YORK, OKLAHOMA AND VERMONT IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

A "large number of states" (*Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897, 903 (2000) (*Shrink Missouri*)), following the lead of the Federal Election Campaign Act of 1971 (FECA) affirmed in *Buckley v. Valeo*,

424 U.S. 1 (1976), have laws restricting the ability of political committees to provide financial support (other than their own independent expenditures) to candidates for public office. A majority of those states, again following the FECA lead, include political party committees among the political committees whose support of candidates is regulated.[1] This case implicates the continuing validity of those statutes, the states' ability to modify them or to enact new campaign finance reforms, and even the states' ability to use limits on contributions made directly to candidates as tools to attack the reality or perception of corruption in state politics.

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[1] *See, e.g.*, Alaska Stat. § 15.13.070(d) (Lexis 2000); Ariz. Rev. Stat. Ann., § 16-905.D (1996); Del. Code Ann. tit. 15, § 8010(b) (1999); Fla. Stat. Ann. ch. 106.08(2) (Supp. 2000); Ga. Code Ann. §§ 21-5-41(b) (2000); Idaho Code § 67-6610A(2) (Supp. 2000); Kan. Stat. Ann. § 25-4153(d), (g) (1993); Md. Code Ann. Elec. § 13-212(a)(i)-(ii) (Supp. 2000); Mich. Comp. Laws Ann. § 169.252(3)-(4) (West Supp. 2000); Minn. Stat. Ann. § 10A.27.1 - .2 (West Supp. 2000); Mont. Code Ann. § 13-37-216(3) (1999); Nev. Rev. Stat. §§ 294A.009.3, 294A.100.1 (1999); R.I. Gen. Laws § 17-25-10.1(a), (e) (1996); S.C. Code Ann. § 8-13-1316 (Supp. 1999); Tenn. Code Ann. §§ 2-10-302, 2-10-306 (Supp. 2000); Vt. Stat. Ann. tit. 17, § 2805 (Supp. 2000); Wash. Rev. Code Ann. § 42.17.640(1), (3) (West 2000). Three states that had such statutes have repealed them: Colorado, which repealed Colo. Rev. Stat. § 1-45-104(5) (1998), though it had been upheld in *Citizens for Responsible Government v. Buckley*, 60 F.Supp.2d 1066, 1095 (D. Colo. 1999); Hawaii, *see* Haw. Rev. Stat. § 11-205 (1993), § 11-205 (Supp. 1999); and California, *see* Cal. Gov't. Code § 85303 as amended by Proposition 34 (2000).

STATEMENT

There is a continuum of financial support for candidates provided by political committees, such as those organized by or affiliated with political parties.

At one end is the parties' funding of their own, independent speech. This Court addressed that end of the continuum the first time this case came to this Court. *Colorado Republican Federal Campaign Comm'n. v. Federal Election Comm'n*, 518 U.S. 604 (1996) ("*Colorado Republican I*"). There, the plurality observed that "[t]he summary judgment record indicate[d] that the expenditure in question [was] what this Court in *Buckley* called an 'independent' expenditure, not a 'coordinated' expenditure that other provisions of FECA treat as a kind of campaign 'contribution.'" *Id.* at 613. The Court held that the government had not justified depriving political parties of the right, which all others were assured by *Buckley*, to speak independently.

At the other end of the continuum lie the parties' contributions to candidates, which fund speech by candidates. The ability of the government to restrict contributions to candidates by all other types of political committees was affirmed in *Buckley v. Valeo* and *Shrink Missouri*. And the government's ability to restrict contributions by political parties to candidates has been upheld three times, in *State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 625-26 (Alaska 1999), *cert. denied* 120 S.Ct. 184 (2000), in *Citizens for Responsible Government v. Buckley*, 60 F.Supp.2d 1066, 1095 (D. Colo. 1999),[2] and most recently in *Landell v. Sorrell*, 2000

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[2] The decision has been appealed, but the validity of the party limits is not at issue because they were subsequently repealed. *See* note 1, *supra*.

U.S. Dist. LEXIS 11606, *24 (D. Vt. Aug. 10, 2000).[3] It has been rejected once, in *Missouri Republican Party v. Lamb*, 227 F.3d 1070 (8th Cir. 2000) (*Missouri Republican*) (petition for certiorari to be filed).

In this case, *FEC v. Colorado Republican Federal Campaign Comm.*, 213 F.3d 1221 (10th Cir. 2000) (*Colorado Republican Remand*), the Tenth Circuit does not distinguish among the range of issues that arise between the point addressed by *Colorado Republican I* and the point addressed by the party contributions cases. Its holding thus applies equally to the instance where the candidate merely learns of the party's expenditure and to the instance where the party pays for speech the candidate has chosen unilaterally. According to the Tenth Circuit, the government – absent some undefined, but yet-to-be-seen form of proof – cannot regulate the party's financial involvement in a campaign at any points.

The significance of any holding that frees political parties from restrictions on their financial support for individual candidates is demonstrated by events in Missouri as a result of the *Missouri Republican* case. That case arose from Missouri's efforts to enforce its limits on party contributions (*not* expenditures, coordinated or otherwise) in 1998. During the 1999-2000 election cycle, Missouri was enjoined from enforcing those limits, thus freeing political party committees – and *only* political party committees – to give candidates unlimited amounts of aid. Looking solely at monetary

[3] In *Landell*, however, the court struck the particular limits adopted for party contributions in Vermont (which ranged from $200 to $400) because they were too low. 2000 U.S. Dist. LEXIS 11606 at *24.

contributions,[4] the impact of that injunction was dramatic. Throughout the 1990s, the most that all political party committees in Missouri (and there are scores of such committees) combined gave to all candidates combined was $820,721 in 1997-98. But in the 1999-2000 cycle, just the Republican and Democratic State Committees contributed a total of $4,128,275 to candidates. The creation of a loophole in contribution limits for contributions by party committees thus dramatically skewed the Missouri political process.

The same occurred in North Carolina. When the legislature exempted national party committees from the state's $4,000 limit on contributions, $750,000 in soft money found its way from the Republican National Committee to the party's candidate for governor.[5]

In both instances, the flow of money through parties to candidates was the result of the elimination of a limit on party contributions, not a limit on coordinated expenditures. But by throwing out limits on party expenditures that are coordinated with candidates regardless of the degree of coordination, the Tenth Circuit's rule would create a hole of similar size and significance.

[4] Missouri separately limits "in-kind" contributions by political party committees. Mo. Rev. Stat. § 130.032.7 (Supp. 1999).

[5] *See*, "Election board can't stop soft money flow," Wilmington Star, Oct. 1, 2000, available at http://www.wilmingtonstar.com/daily/10012000/local_st/27124.htm; "Money from afar," Charlotte Observer, October 4, 2000.

INTRODUCTION

Contributors and candidates alike, serving their respective self-interests, encourage innovation. They are engaged in a constant, and too often successful search for methods of transferring money (or services that are the equivalent of money) around the boundaries set by FECA and its state counterparts. Hence we see an active national debate over regulation of now-unregulated "soft money" that is received and disbursed by national political parties. That debate has indirectly highlighted the role of state political parties: they are major recipients of the national parties' "soft money" disbursements. In a recent report on their study of party financial support for legislative candidates, two political scientists noted the large and growing role of "soft money" in state campaigns:

> The 1996 election was a watershed for "soft money" (that is, unregulated money with no limits as to who can contribute or how much can be contributed). Soft money is raised by the national party committees for purposes of party building. More specifically, soft money is used for paying a portion of state party overhead; for campaign activity that benefits federal, state, and local election (e.g., voter registration and get-out-the-vote drives); issue advocacy; and generic party advertising. The 1995-1996 election cycle saw a soft money explosion. The Democratic national party committees spent $121.8 million in nonfederal soft money, a 271 percent increase over 1992! Republicans spent $148.7 million, a 224 percent increase over 1992! For Democrats, $64.6 million of this money was transferred to state party committees

> and $4.4 million was contributed directly to state and local candidates. The Republicans transferred $50.2 million of this money to state parties and contributed $5.2 million to state and local candidates . . . .

A. Gierzynski & D. Breaux, "The Financing Role of Parties," in J. Thompson & G. Moncrief, CAMPAIGN FINANCE IN STATE LEGISLATIVE ELECTIONS (Congressional Quarterly 1998), at 204.

"Soft money" funneled through national party committees is only one piece of the biggest wave of campaign finance innovations threatening to swamp campaign finance reform at the beginning of the new century: the use of political party committees to channel – or, to use a more pointed term, to launder – large contributions to candidates. Left unchecked, that wave will wash away the states' ability to attack the movement of large sums to candidates. The states will again find themselves in a "regime of large individual financial contributions," with its "inherent" "public awareness of the opportunities for abuse." *Buckley v. Valeo*, 424 U.S. at 27. Only in those few instances where party leaders are so inept as to leave a publicly available paper trail between contributor and candidate, or where the trail is disclosed by informants, will the states still be able to act. And even then, the available criminal or other civil penalties will necessarily be inadequate, for such penalties can never be anything more than a deterrent: they cannot be invoked until after the people have spoken at the ballot box, and do not reverse the tainted election.

The amici states thus urge the Court to reverse the decision of the Tenth Circuit in its entirety. In the alternative, the amici states urge the Court to restrict that decision to instances where the party, rather than the candidate, really does

control the expenditure – thus preserving the states' ability to restrict the movement of money directly and indirectly to the control of a candidate.

SUMMARY OF ARGUMENT

The Tenth Circuit has, for political parties, abolished the contribution/expenditure line drawn in *Buckley v. Valeo* and most recently reaffirmed in *Shrink Missouri*. Where the Tenth Circuit in *Colorado Republican I* would have eliminated the parties' ability to make independent expenditures, here it would give the parties the ability to make unlimited coordinated expenditures. And because the Tenth Circuit's holding is broad enough to cover expenditures regardless of the level of coordination – it would effectively end the regulation of financial support by political parties to candidates. Such steps are not justified by any of this Court's precedents.

The imposition of limits on coordinated expenditures is justified by two rationales recognized in *Buckley v. Valeo*: the states' compelling interest in attacking even the perception of corruption; and the need to prevent evasion of their laws that attack that perception. Political parties are no less susceptible to contributors seeking to evade contribution limits than are committees such as Shrink Missouri Government PAC. And the Tenth Circuit's decision contains neither findings nor logic to support the premise that either the reality or the perception of corruption evaporates when funds flow through party, rather than other political committees.

Perhaps there are some party expenditures where the contact between the party and the candidate is so limited that a particular expenditure in support of a particular candidate really is independent despite being made with the candidate's knowledge, and thus should not be considered a contribution.

But if so, the proper course would be to define the scope of such protected expenditures, then to remand this case to determine whether the expenditures at issue were protected. Doing so would not only defer the dramatic effect that otherwise results from the Tenth Circuit's decision, but would give the states guidance they need as they seek to eliminate the perception of corruption while complying with constitutional limits.

ARGUMENT

I. That the transaction involves a committee associated with a political party does not erase the distinction between contributions and expenditures.

The Tenth Circuit finds the continuum of methods of party financial support for campaigns to be a slippery slope. According to the Tenth Circuit, once this Court started in *Colorado Republican I* to slide at the point of independent expenditures, it was fated to continue through the entire range of coordinated expenditures.[6] In *Buckley v. Valeo*, this Court addressed a similar range of issues for expenditures and contributions by individuals and by nonparty committees. Nothing in that decision suggested a slippery slope. Instead, the Court found a clear distinction, of constitutional significance, between expenditures in all their variations and contributions in all their variations. The Court has since reaffirmed that distinction. *See Shrink Missouri*, 120 S.Ct. at 903-04. Nothing in this Court's precedents nor in the facts of this case justifies a different result solely as to committees affiliated with political parties. Certainly such a step is not required by *Colorado*

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[6] The Eighth Circuit agreed, and held in *Missouri Republican* that the slide continued on through direct financial contributions to candidates. 227 F.3d at 1071, 1073.

Republican I.

There, this Court considered independent advertising by one major political party in opposition to a declared candidate for the nomination of the other party. The FEC urged, and the Tenth Circuit agreed, that the expenditure be treated as a contribution, subject to contribution limits. This Court determined that such expenditures, even when made by a political party, may be independent, and thus protected by the *Buckley* rule. By so doing, the Court rejected the FEC's effort to restrict the protection given to "independent expenditures" in *Buckley* so narrowly as to make that tool unavailable to political party committees.

Here, the Colorado Republican Federal Campaign Committee pressed its argument, and persuaded the Tenth Circuit to act, at the other end of the expenditure-contribution continuum. But that position threatens a result parallel to what this Court refused to sanction in *Colorado Republican I*: to make unavailable to the states, as to political parties, a tool expressly authorized by this Court in *Buckley*. By giving constitutional protection to party expenditures regardless of how extensively they are coordinated with candidates, the Tenth Circuit would effectively eliminate the ability of the states to attack the appearance of corruption that is inherent in a regime of large contributions, so long as the contributions flow through political parties, and so long as the contributors, candidates, and parties are sophisticated enough to avoid creating enough of a record to make prosecution possible.

There is neither precedent nor justification for giving all party spending the constitutional protection given to independent expenditures, making political party committees essentially immune from regulation.

II. Party expenditures in support of individual candidates enable evasion of other limits on contributions and carry the perception of corruption that those limits attack.

Limits on financial assistance by committees generally, and political party committees specifically, is justified by two governmental interests: the need to prevent evasion of the individual limits this Court has upheld; and the potential for corruption or its appearance that is created by the use of committee funds to support individual candidates. With regard to the first, the Tenth Circuit's decision necessarily is based on one of two assumptions: that evasion of limits on individual and party contributions by channeling money through the parties is impossible; or that such evasion is insufficient to justify regulation. The second assumption is inconsistent with the holding in *Buckley*. And the first makes no sense.

In *Buckley*, this Court upheld a $25,000 limit on total contributions by any one individual to all committees or candidates in any one year. The Court observed that without such a limit, a person "might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38. Preventing the evasion of limits on the movement of campaign funds from individuals remains a viable and important justification for limits on contributions by committees. And it applies equally well when the committees involved are those organized by or affiliated with political parties. In fact, the Tenth Circuit fails to articulate any reasonable basis for believing that evasion is less likely when funds flow through Colorado Republican Federal Campaign Committee than when they flow through the Shrink Missouri Government PAC.

The Tenth Circuit's discussion of the close connection between the parties and their candidates parallels that of the Eighth Circuit in *Missouri Republican*. *See Colorado Republican Remand*, 213 F.3d at 1227-28, *Missouri Republican*, 227 F.3d at 1072-73. But both courts focus only on the parties' speaking through candidates, neglecting the candidates' success at using the parties. That success has long begun organizationally, as candidates for major offices (president, governor, senate, etc.) ensure the election or appointment of their own allies to party positions. For example, after the governor of Missouri declared himself as a candidate for the U.S. Senate in the 2000 election, his former chief of staff became executive director of the Missouri Democratic Party. A leading candidate for Governor of Virginia is apparently naming his party's new chairman.[7] A candidate's success in using the party continues as the party acts as the candidate's surrogate, sometimes to give the candidate deniability on controversial or offensive statements or advertising, at other times to reiterate the candidate's personal message. In fact, national and state parties showed very effectively again in 2000 that they will run advertisements that either overtly or covertly support a particular candidate using funds in amounts that could not go to the candidate directly, but which were raised with the candidate's help. The implicit suggestion in the Tenth Circuit's decision that despite those connections and actions political parties are inherently so separate from candidates as to make such evasion impractical or unimportant simply makes no sense.

The possibility of evasion goes beyond "how much" can be contributed to a candidate. It goes to "from where." Some states preclude or at least limit candidates from accepting

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[7] *See* http://washingtonpost.com/wp-dyn/articles/A7214-2000Nov12.html.

contributions from corporations or labor unions.[8] That national and often state political parties *can* accept such contributions makes it possible for corporations and unions to channel funds to candidates despite the prohibitions. Again, political scientists studying the movement of funds have identified a notable example:

> North Carolina law limits individual contributions to $4,000 per election and bans corporate contributions. But take the case of Robin Hayes, the 1996 Republican nominee for governor and an heir to the Cannon Mills textile fortune. Trailing badly one month prior to the election, he paid a visit to an old friend who happened to be the vice chairman of First Union Bank. Hayes requested that the bank make a contribution to the Republican National Committee (RNC). The bank responded with contributions totaling $100,000. The same day, another North Carolina corporation gave the RNC $12,000 at the request of the Hayes campaign. Two weeks later, Hayes contributed

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[8] *See, e.g.*, Ala. Code § 10-2A-70.1 (1999); Alaska Stat. § 15.13.074(f) (2000); Ariz. Rev. Stat. Ann. § 16-919 (2000); Ky. Rev. Stat. Ann. § 121.025 (1998); Mass. Ann. Laws Ch. 55, § 8 (2000); Mich. Comp. Laws §§ 169.254, 169.255 (2000); Minn. Stat. § 211B.15 (2000); Miss. Code Ann. § 97-13-15 (2000); Mont. Code Ann. § 13-35-227 (2000); N.Y. Elec. Law § 14-116 (Consol. 2000); N.C. Gen. Stat. § 163-278.15 (2000); N.D. Cent. Code § 16.1-08.1-03.3 (2000); Ohio Rev. Code Ann. § 3599.03 (Anderson 2000); Okla. Stat. tit. 21, § 187.2 (1999); Pa. Stat. Ann. tit. 25, § 3253 (1999); S.D. Codified Laws § 12-25-2 (2000); Tenn. Code Ann. § 2-19-132 (2000); W.Va. Code § 3-8-8 (2000); Wis. Stat. § 11.38 (1999).

> $100,000; the RNC netted a total of $212,000 from Hayes' efforts. Within days, the Republican national committee sent the state GOP $213,450. That same day, the state party made a contribution of $213,450 to the Hayes campaign . . . .

J. Thompson & G. Moncrief, "Exploring the 'Lost World' of Campaign Finance," in J. Thompson, *supra*, at 4-5. Absent limits such as those at issue in this case, the only tools for preventing evasion are, again, civil and criminal penalties. But even in the seemingly obvious Hayes example, successful prosecution is improbable. With millions of dollars flowing through national committee accounts, it is unlikely that sophisticated money managers will leave a paper trail sufficient to rebut their own self-serving claims of "independent" decisions to channel party funds to support contributors' favored candidates.[9]

In addition to rejecting the idea that evasion is an ill justifying prophylactic measures, the Tenth Circuit rejects the idea that the public perceives corruption when large sums that

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[9] Again, the Hayes incident in North Carolina is instructive. Contemporaneous articles quoted RNC officials as denying that corporate money ever flowed to North Carolina. J. Morrill, "Soft money mocks limits on campaign contributions," Charlotte Observer, June 1, 1997, p. 6A, col. 3. But as an attorney for the North Carolina Democratic Party was reported as saying about his own party, "the [National Committee] sends donations from North Carolina corporations to one of many states that accept them. Individual soft money from those states ends up in North Carolina." *Id.* The Republican Party apparently took that approach this year. *See* articles cited in note 5, *supra*.

flow to political parties are used to support individual candidates. To put it in the context of the North Carolina example cited above, the Tenth Circuit implicitly concludes that the public would not (or perhaps just could not reasonably) perceive corruption if the corporate checks, though used to support Hayes, remained in the party's hands. Such a conclusion finds no support in the Tenth Circuit's logic or its citations to the record before it. And such a conclusion is not logical, reasonable, or consistent with longstanding public views of the role of party financiers.

Though we may now be far removed from the days of the Pendergasts or Tammany Hall, the connection between parties and undue influence has not disappeared – either in reality or in the public mind. The machine politics of the last century have been replaced by other, more sophisticated and less sinister approaches, but they, too, tie candidates to big party contributors. Perhaps the most obvious is the use, by parties, of candidates and public officials as fundraising attractions. Such use takes many forms, ranging from the mere announcement of an official as a "sponsor" for a single event, to a "club," whose members are entitled to mingle with – and privately express their views to – candidates and officials on a regularly scheduled basis. Those events play a role in creating the "growing public dissatisfaction with campaign finance" that is based on the assumption that when PACs and lobbyists pay campaign costs, "there is some quid pro quo expected in return." J. Thompson, *supra*. at 5. What contributors to the parties – like contributors directly to candidates – label "'access' . . . is more likely to be perceived by the public as 'undue influence.'" *Id*. at 6. There is nothing in the Tenth Circuit's decision to alleviate the public's concern that "undue influence" can be obtained as effectively by paying the party for the privilege of sitting at breakfast with a candidate as by paying the candidate directly.

III. That some party expenditures in support of, but not actually handed to candidates might be outside the realm of constitutional regulation does not justify the Tenth Circuit's broad holding.

Under the Tenth Circuit's analysis, a political party's right to make unlimited "coordinated expenditures" permits it to do anything from placing its own advertisement supporting a candidate after merely notifying the candidate, to paying a bill the candidate has already incurred. Certainly as to both of the concerns addressed above – evasion and the perception of corruption – there is a significant difference between those points on the continuum. Yet the Tenth Circuit's decision makes no distinction. This Court should not endorse that broad-brush approach.

That is particularly true when the Court's holding will immediately affect not just the federal statute at issue here, but also state statutes that extend beyond the extremely narrow realm to which the Tenth Circuit would relegate this Court's affirmance of limits on contributions. Just how it will affect state statutes will depend in part on the precise manner in which each state law addresses expenditures that fit within the Tenth Circuit's broad use of "coordinated." Only one state expressly does what the FEC urges here: defines any party spending in support of a particular candidate as a "contribution," subject to its limits.[10] Some states have not specifically addressed the

[10] S.C. Code Ann. § 8-13-1300(17) (Supp. 1999) (unregulated "independent expenditures" exclude those "made to, controlled by, coordinated with, requested by, or made in consultation with a candidate," but all party expenditures in support of a candidate are considered to be "controlled by" the candidate, and thus are subject to the state's contribution limits).

issue of "coordinated" expenditures, but have broad definitions of "contribution" that cover at least some party expenditures.[11] Others have more specific language, defining party expenditures as contributions when they are made "in cooperation, consultation, or in concert with, or at least at the request or suggestion of, a candidate."[12] That language may appear not in the definition of "contribution" itself, but in a separate definition of "independent expenditures," ones that are excluded from the definition of and limitation on

[11] *E.g.*, Del. Code Ann. tit. 15, § 8002(6) (1999) (contribution includes any expenditure made for the benefit of any candidate, except independent expenditures); Fla. Stat. Ann. ch. 106.11(3)(a) (Supp. 2000) (contribution includes any "payment. . . including contributions in kind having attributable monetary value in any form, made for the purpose of influencing the results of an election"); Ga. Code Ann. § 21-5-3(6) (2000) (similar); Idaho Code § 67-6602(c) (Supp. 2000) (contribution includes the transfer of anything of value); Kan. Stat. Ann. § 25-4143(d) (1993) (same); Mich. Comp. Laws Ann. § 169.204 (West Supp. 2000) (similar); Nev. Rev. Stat. §§ 294A.007 (1999) (similar); R.I. Gen. Laws § 17-25-3(3) (1996) (similar); Tenn. Code Ann. § 2-10-102(3) (Supp. 2000) (similar); Vt. Stat. Ann. tit. 17, § 2801(2) (Supp. 2000) (similar). Such definitions might be limited by rule or policy, however. For example, the Missouri Ethics Commission has formally interpreted the Missouri law, Mo. Rev. Stat. Ann. § 130.011(12) (Supp. 1999), to define "contribution" to include only spending that is "requested to be made by, directed or controlled by, or made in cooperation with, or made with the express or implied consent of the candidate." Missouri Ethics Commission Opinion No. 96.06.135 (July 1996).

[12] Wash. Rev. Code Ann. § 42.17.020(14)(a)(ii) (West 2000).

"contributions" in a legislative attempt to give definition to this Court's holding in *Buckley v. Valeo*.[13]

None of the published opinions in this case cite any evidence for the proposition that the party spending addressed by the FEC was made "in cooperation, consultation, or in concert with, or at least at the request or suggestion of, a candidate." The facts cited by the court of appeals and the district court may not even justify a holding that party expenditures at the "mere notification" point on the continuum are entitled to *Buckley*'s "expenditure" protections. But to restrict the Tenth Circuit holding to that point would prevent its being used to interfere in states that have taken a position less aggressive than that of the FEC. And it would give states more guidance as they seek to confine their attacks on the appearance of corruption within the bounds allowed by the Constitution.

On the other hand, to fully endorse the Tenth Circuit's holding would cast doubt on, even state laws that address only those party expenditures at the other end of the continuum, *i.e.*, where the level of coordination makes them the undisputed equivalent of a candidate's own spending. In fact, as shown by the Eighth Circuit's holding in *Missouri Republican*, the Tenth Circuit's rule can easily be applied to prevent states from regulating even the movement of money directly to candidates. Affirming the Tenth Circuit's holding would thus make evasion and the perception of corruption the rule, rather than the exception.

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[13] *E.g.*, Ariz. Rev. Stat. Ann. § 16-901.11 (1996); Fla. Stat. Ann. ch. 106.011(5)(a) (Supp. 2000); Idaho Code § 67-6602(g) (Supp. 2000); Minn. Stat. Ann. 10A.01.4, .11, and .13 (West Supp. 2000).

CONCLUSION

For the reasons stated above, the Court should reverse the decision of the Tenth Circuit.

Respectfully submitted,

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December 1, 2000